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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20546

A. Zuckerman

PL 2

FILE: B-190997

DATE: May 11, 1978

MATTER OF:

Trio Chemical Works, Inc.

DIGEST:

1. Protest filed after rejection of proposal is timely where protest is directed to propriety of proposal rejection notwithstanding noncompliance with RFP requirement, rather than to validity of RFP requirement itself.
2. Rejection of proposal for failure to comply with insecticide labeling requirements, notwithstanding that offered product is chemically identical to acceptable product and can be furnished at less cost, is proper where labeling requirements reflect Government's actual needs, offeror's registered pesticide label does not conform with those needs, and use of pesticide in manner inconsistent with its labeling would be in violation of Federal law.

Trio Chemical Works, Inc. (Trio) protests the award of a contract to any company other than Trio under Request for Proposals (RFP) DSA-400-77-R-3528 issued by the Defense Logistics Agency (DLA).

The solicitation was for the acquisition of 115 30-gallon drums of Dichlorvos pesticide. Trio's low offer was rejected because it did not comply with the labeling requirements for the pesticide which were set forth in the RFP as amended, and award was made to another company. Trio asserts that it should have received the award because it offered, at almost half the price, a product that was chemically identical to that of the awardee's pesticide. Trio suggests that DLA's insistence on compliance with the labeling

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requirements had the effect of converting the procurement from a competitive requirement to one made on a sole-source basis.

The RFP, as amended, required an insecticide for use against several listed target pests. Trio's label did not include one of the pests listed. The RFP also specified several sites in which the insecticide was to be used, i.e., warehouse storage areas, railroad cars, trucks and food processing areas. Trio's label specified only warehouse areas.

DLA suggests that the protest should be dismissed as untimely pursuant to 4 C.F.R. 20.2(b)(1) (1977) because it regards the protest as going to the validity of the RFP's labeling requirement, which must be filed prior to the closing date for receipt of proposals, whereas Trio's protest was filed after rejection of its proposal. In our view, however, the protest is directed to the propriety of the rejection of the protester's proposal notwithstanding the labeling requirement, rather than to the requirement itself. Accordingly, we will consider the matter.

The labeling requirements stem from the Federal Environmental Pesticide Control Act of 1972, Pub. L. 92-516, as amended, 7 U.S.C. 136 et seq. (1976) and the regulations of the Environmental Protection Agency (EPA). Pursuant to the Act, all pesticides must be registered with EPA. 7 U.S.C. 136a(a). A complete copy of the labeling of the pesticide, a statement of all claims to be made for it and any directions for its use must be included as part of the registration. 7 U.S.C. 136a(c)(1)(C). If labeling for a pesticide is changed, the Act requires that the registration be amended to reflect the change. 7 U.S.C. 136a(f). The Act also makes it unlawful to use any registered pesticide in a manner inconsistent with its labeling, 7 U.S.C. 136(j)(a)(1)(G), and provides civil and criminal penalties for its violation 7 U.S.C. 136i.


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EPA's statement of its enforcement policy provides that a registered insecticide may be used against unnamed pests only if they are improbable, unanticipated or otherwise infrequent in their occurrence (which the agency states is not the case here), but only if the pesticide is registered for use in the type of site which is to be treated, and no other registered pesticide is reasonably available in the geographic area in which the pesticide is to be used. Pesticide Enforcement Policy Statement No. 5 (PEPS), 41 Federal Register 41142, 41144, September 21, 1976. Any registered pesticide which is currently in the channels of commerce in the geographic area where the user does business is presumed, for the purpose of enforcement, to be reasonably available for the control of all pests named on its label. PEPS 5, supra at 41146.

The record indicates that the target pests and sites specified in the RFP reflect DLA's determination of its actual needs and Trio does not dispute them. In view of those needs and of the statutory and regulatory provisions concerning labeling of insecticides, it appears that the use of Trio's product against the unlisted target pest and in those sites not listed on its EPA registered label would be a use in a "manner inconsistent with its labeling" and a violation of Federal law, and thus DLA's needs could not be satisfied by award of a contract to Trio for the acquisition of the pesticide in question. The fact that the competing products may be chemically identical does not alter the restriction on the use of Trio's product in accordance with its label.

Moreover, the fact that only one firm may be able to furnish the specified product with the appropriate labeling does not render improper either the Government's requirement or the award in this case.

The protest is denied.


Deputy Comptroller General
of the United States